

KEYWORD: Guideline B

DIGEST: In her File of Relevant Material (FORM), which includes a request for the Judge to take administrative notice of facts concerning Ukraine, Department Counsel did not assert the “very heavy burden” standard should be applied in this case. Moreover, neither the FORM nor the administrative notice request contain arguments that the geopolitical situation in Ukraine is the equivalent of those in a hostile country. In other words, Department Counsel did not give Applicant or the Judge notice in the FORM of the Government’s position on this issue. Given this lack of notice, it is not surprising that Applicant did not submit any evidence or arguments to the Judge regarding this issue and the Judge did not analyze it. These circumstances raise fairness and due process concerns. This is an issue that should have been appropriately presented to the Judge for him to decide. Decision is Remanded.

CASE NO: 19-03991.a1

DATE: 07/06/2021

DATE: July 6, 2021

In Re:)	
)	
-----)	ISCR Case No. 19-03991
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Andrea M. Corrales, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 10, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On March 18, 2021, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged that Applicant’s wife, stepchild, and parents-in-law were citizens and residents of Ukraine, that his wife owned an apartment in Ukraine, and that he had contact with numerous Ukrainian and Russian nationals. The allegation asserting that Applicant had contact with Russian nationals was later withdrawn. The Judge concluded that various disqualifying conditions applied in this case and that Applicant mitigated the resulting security concerns.

In her appeal brief, Department Counsel argues the Judge erred in failing to apply the “very heavy burden” standard in analyzing Applicant’s mitigation evidence. In support of her argument, she cites ISCR Case No. 14-02563 at 3 (App. Bd. Aug. 28, 2015) and contends that “widespread government corruption and instability and unrest at the hands of Russia in various parts of Ukraine” warrant the application of that standard. Appeal Brief at 13. *See also* ISCR Case No. 12-05092 at 5 (App. Bd. Mar. 22, 2017) in which the Board noted the security situation in Ukraine warranted a heightened level of scrutiny in the Judge’s mitigation analysis.

We note that Department Counsel is raising this issue for the first time on appeal. In her File of Relevant Material (FORM), which includes a request for the Judge to take administrative notice of facts concerning Ukraine, Department Counsel did not assert the “very heavy burden” standard should be applied in this case. Moreover, neither the FORM nor the administrative notice request contain arguments that the geopolitical situation in Ukraine is the equivalent of those in a hostile country. In other words, Department Counsel did not give Applicant or the Judge notice in the FORM of the Government’s position on this issue. Given this lack of notice, it is not surprising that Applicant did not submit any evidence or arguments to the Judge regarding this issue and the Judge did not analyze it. These circumstances raise fairness and due process concerns.¹ This is an issue that should have been appropriately presented to the Judge for him to decide.

Based on the above, we conclude the best course of action is to remand the case to the Judge to reopen the record to address this issue. As provided in Directive ¶ E3.1.35, the Judge shall, upon remand, issue a new decision in the case. The Board retains no continuing jurisdiction over a remanded decision. However, a decision issued after remand may be appealed pursuant to Directive

¹ This is the second time Department Counsel has sought on appeal to apply a “very heavy burden” standard when no such request had been made at the hearing level. In ISCR Case No. 19-01689 (App. Bd. Jun. 8, 2020), we declined to apply that standard or remand the case. Although we are remanding this case, we must note that this cannot become a practice in DOHA cases.

¶¶ E3.1.28. to E3.1.35. *See* Directive ¶ E3.1.35. Department Counsel has raised other issues that are not ripe for consideration at this time.

Order

The Decision is **REMANDED**.

See Concurring Opinion
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board

Concurring Opinion Of Administrative Judge Michael Y. Ra'anan

I agree with the majority opinion in full. I note that the Judge correctly found three disqualifying conditions applicable which contain the presence of "heightened risk" of foreign exploitation, inducement, etc. It would be beneficial for the Judge's decision after remand to discuss in detail how the presence of multiple aspects of heightened risk influenced his analysis.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board